Interview with Newcastle Radio.

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INTERVIEW WITH

THE HONOURABLE JUSTICE MICHAEL KIRBY AC CMG

PRESIDENT OF THE COURT OF APPEAL

What is the jurisdiction of the Court of Appeal?

The Court of Appeal is the highest court in the State of New South Wales. It is the busiest appellate court in Australia. It is subject to the High Court of Australia, the final court for disputes in New South Wales, which is the busiest, most litigious State in the country, as well as the most populous State. 98-99% of all litigation in New South Wales finishes at the Court of Appeal. Only about 1% of our orders are subject to appeals to the High Court of Australia, by special leave of that court. It is therefore an important court in the hierarchy of courts of Australia.

To some extent, in recent years, the High Court has moved more significantly into areas of criminal law, and into areas of constitutional and federal law. That has meant that the Court of Appeal of New South Wales has acquired, I think, an influence in the development of private law right around Australia. This has occurred because we deal with the whole range of problems in the civil and public law areas, and inevitably, as a full time appellate court and such a busy court, we have filled, I believe, a gap which was opened up when appeals as of right to the High Court of Australia were terminated. That court now only hears appeals in cases where special leave is given by that court. That, I think, is the reason why the Court of Appeal of New South Wales has acquired an influence in the development of law that goes beyond the State of New South Wales. If you look at the case books and law journals of Australia and beyond, you will see the way in which Court of Appeal decisions in New South Wales are being utilised throughout the country.

New South Wales was the first State to move towards a permanent court of appeal. Before it was established, New South Wales followed the tradition which is followed still in most of the States of Australia. Judges would spend part of their time in trial work, and then part of their time in appellate work. They would rotate and take appeals in turn, although usually the most senior judges did more appellate work than junior judges. But in 1965, the Askin Government decided to establish a permanent appellate court. Unsurprisingly, perhaps, I believe that that was the right decision.

Appellate work is, in some respects, different from trial work. The skills that are required for appellate judicial work are not exactly the same as the skills required for trial work, although obviously there are some similarities. It is

necessary as an appellate judge, in a general court of appeal, such as the Court of Appeal of New South Wales, to try to see the whole mosaic of the legal system; to see how it is developing, to think conceptually about the law, to be very alive to legal policy and the issues of principle that arise in respect of the law, to be conscious of legal history, to be aware of the role of the judge in developing and expanding the principles of the law, and to sometimes playing a part in the reform of the law, particularly in procedural matters. All of that, I believe, takes place more readily in a permanent appellate court, than it does where a judge is rushing between his trial duties and the duties of the Court of Appeal.

Some judges do not find appellate work congenial. They prefer to be in command of their own courtroom with the excitement and stimulation of the drama of the trial. For them, the business of getting the dramas second hand through the cold pages of the transcript in the appeal books is not so attractive. But that is the life I lead, together with my colleagues in the Court of Appeal: hearing argument, reading appeal books, considering legal principles, deciding cases. I think the Court of Appeal of New South Wales is a very distinguished court. The company I keep is very interesting, civilised, intelligent and extremely hard-working.

What work does the Court of Appeal do?

Its work is appellate, and what we call, original jurisdiction. The appellate work is what the word suggests. Hearing appeals: appeals from single judges of the Supreme Court, appeals from the District Court, the Land and Environment Court, and in some cases, other tribunals, for example, the Equal Opportunity Tribunal, on points of law.

It is also original. The original jurisdiction involves dealing with cases of contempt of court, which are assigned in the Court of Appeal, cases that involve, for example, the media and pre trial publicity. The responsibility of dealing with those problems falls on the Court of Appeal.

As well as that, the Court has, what is called, a judicial review jurisdiction. It sends its orders, in the nature of the ancient orders of the Royal Courts of England to other lower courts, tribunals, and officer holders throughout the State, to require that they keep within their jurisdiction, and they exercise their jurisdiction, that they do not stray outside their powers, and that they conform to the law and fair procedures. So that this is the range of work that the Court of Appeal does.

I have now been a Judge of Appeal and President of the Court for nearly 10 years. Before that, I was Chairman of the Law Reform Commission for

nearly 10 years. My life seems to move in 10-year cycles because before that, I was a barrister for nearly 10 years. In the 10 years I have been at the Court of Appeal, there have been some changes, although overwhelmingly the Court has its own institutional momentum. Each Judge who is appointed makes a marginal contribution to the institution. But not one that I would want to exaggerate. In the business of the judicial branch of government, of which the Court of Appeal is at the head in New South Wales, it is institutions that matter, and not individuals as such.

The Court of Appeal is, I believe, a very happy court, I think that is fair to say. We all have our different philosophies and our different backgrounds, our different interests, but we get on pretty well together. As judges we meet as a group together at least once every fortnight. The first item of business in our meeting is the list of reserved judgments. We go through them in the presence of each other. We are required, by that means, to explain to each other any delays. That keeps the business of the Court moving efficiently. But it also permits the judges to take part in the government of, the running of, the Court. It runs as a democracy, not as an autocracy. We talk about the procedures, and the mechanisms for more efficient, cost effective and inexpensive justice, and that is under our review constantly. I want to emphasise that.

To some extent, the controls which the Judges can enforce are limited. For example, the fees for filing an appeal in the Court of Appeal are now $1,550. That is an extremely high filing fee. It has even been suggested that it may be so high that it amounts to an impediment created by the Executive Government to the exercise of the right of appeal which Parliament has given. The fee is fixed, not by the Court, but by the Government. The Judges have to accept the fees that the Government fixes, so long as they are within the law. The result of such a very high filing fee has been that in 1993 for the first time since the establishment of the Court of Appeal in 1965, there has been a drop in the filings of appeals in the Court of Appeal. Not a big drop. I believe it is a response to the extremely high filing fee that must be paid just to open the door of the Court of Appeal. I believe that it is a mistake to impose such a fee. It is chicken feed to big insurance companies, large corporations and the powerful interests in our community. But it amounts to a real burden on ordinary people in getting at justice.

However, there have been other areas where the Judges can influence developments and have done so. For example, there has been a great shift in my time towards more written argument. You can read a document on average four times more quickly than the same words can be spoken. That therefore is a way of shifting time, and therefore cost, into a documentary form. There are still of course costs in preparing such documents. But it is a way of mobilising the scarce time of the Judges more efficiently. I believe that, as in the United States, we will move towards more written documentation in court hearings.

I would not be surprised if, at the turn of the century, the courts generally, and the Court of Appeal in particular, had express powers to limit the time that lawyers take in presenting their arguments. We can do so at the moment by gentle persuasion - sometimes not so gentle - But we do not have the provisions of a statute which permit me to say "you have half an hour to present this case". That is the position in the United States and Canada, where the higher appellate courts have definite time limits. It is the only way that the courts have been able, in Canada and in the United States, to cope with their expanding workload. I think we will come to that. I believe that by the turn of the century the skill of the advocate in Australia will be to so present complex issues in a relatively short time as to permit the decision-maker to make the decision on the case efficiently and justly. That will be the skill for which the lawyer is paid. At the moment, we can merely hurry the case along. I should say that is done pretty effectively, simply because everybody understands the great pressure that the Judges of Appeal work under. But the enhancement of their formal powers will almost certainly come.

Some obvious changes which have occurred have related to information technology. Submissions and other documentation are now received by facsimile. The greater use of computers in research. In 1994 the Judges of the Court of Appeal are all going to undertake a training course in the use of information technology. That even includes Mr Justice Meagher, who was, at first, a reluctant participant in this new-fangled technology. But there he will be. He will be undergoing the training, together with the rest of us. Ultimately every institution and every Judge has to submit to these changes. I predict that within my service in the Court, which continues into the next century, that we will see the replacement of appeal books by computerised presentation of the trial information. That has already happened in some Provinces of Canada. Judges have terminals on the bench with them. This saves the expensive reproduction of the material, the transcript, in documentary form. It should help in reducing the costs of the preparation of appeal books, and hence the costs of appeals.

Appeals are useful, because to be human is to make errors. We all make errors. I make errors. And they can all be corrected in the judicial hierarchy. Only the High Court of Australia makes no errors, at least that is the theory of the hierarchy of Australian courts. But even in the case of the High Court, they sometimes themselves perceive errors in their earlier decisions. Such as was the reversal in the decision in the *McInnes* case, which denied the right of indigent litigants in serious criminal trials to legal counsel. That decision was over-ruled by the High Court last year in the case of *Dietrich*. So everybody makes mistakes sometimes. That is just part and parcel of the human justice system. The value of appeals is that they permit a second look at the issues; a reconsideration of cases. There is a limit on the search for ultimate justice, which is always elusive. There is also a need for finality in the extremely upsetting, draining and expensive business of litigation. But there is a value, as

my daily life demonstrates to me, of having a second look at judicial decisions. That is the function of the Court of Appeal.

So technology is changing, the conception of the role of the Judge is changing, the manner of the conduct of appeals is changing, and the manner of the running of the Court of Appeal itself is changing. I think all of these changes are healthy.

Yet the bedrock remains. Independent judges who are not leaned on by big business, big government, big media, but answerable only to the law and their consciences. That is a very precious feature of our system of government. It is a feature we have inherited from England. It is a feature that is not common in the world today. We should not be despising and denigrating it. We should be celebrating the fact that we are amongst the few in the world who enjoy the neutral guardian of liberties, rights and the law. That is not an idle boast, or even immodesty. It is a recognition of the very great importance which an independent judiciary plays in securing for Australians the sort of society, and freedoms, that they all too often take for granted.

What experiences moulded your approach as a Judge?

I did not go to a private school. I went to public schools. I began at Mrs Church's kindergarten in Strathfield. I then went to the North Strathfield Public School, where I was taught by Miss Pontifex, in the company of boys and girls from my suburb. At the age of 9, I was whisked away to an Opportunity School at Summer Hill, where I spent two years learning a great deal about Gilbert & Sullivan, and not very much about mathematics. I still make mistakes in my sums. I then went to Fort Street Boys' High School (now Fort Street High). It is the oldest public school in Australia. It is the second oldest school in Australia, the oldest being the King's School at Parramatta. It is a school with a very long tradition of professionalism and excellence. It has many connection with the legal profession. We were, at school, encouraged to see our gifts as opportunities, and as presenting obligations to make the most of them, and not to think of ourselves as especially important, but as citizens of this country, with an obligation to do our best, to make the most of a short life, and never to forget the less fortunate. I have certainly tried in my life to live out those values that I learned from my parents, my church, my school, the teachers I had including the instruction I received from the other boys and girls, young men and young women, with whom I grew up worked and played.

Mine was a fairly orthodox sort of life. School, university, articled clerk, solicitor, barrister, Judge. But I was fortunate in being given the opportunity to serve in the Law Reform Commission for nearly 10 years. That helped me to see the law conceptually and the need for its reform and renewal. The proud boast about the rule of law is pretty empty when the law, when discovered, is out of date or inaccessible to ordinary people. I think it is inevitable that I

therefore look at the issues which come before me as a Judge, with a slightly different perspective from those who did not have that law reform experience. It gives me a slant you could say; I see the law through a prism which is slightly different. But I think it is one which is a legitimate contribution to the appellate process. At least I hope so. And I add to that perspective more recently my perspectives of the way in which our Australian law has to fit into the great developments of international law, especially international human rights law, which are a feature of the interconnecting world we live in. Each judge brings his or her own perspectives. I bring mine. They began in an orthodox way. They have taken a number of slightly different courses. I simply bring my experiences to bear, as my colleagues do, in the common task.

Despite the gossip and rumour factory of the Bar common rooms, the Judges of the Court of Appeal all get on very well. Justice Meagher begged me in his Christmas card never to tell the media that he and I were friends. But oops, I've let it out. And it is a fact. People can have different philosophies, but respect the integrity and independence of other judges. Always have a willingness to acknowledge that no-one has a monopoly on wisdom. All of us are conscientiously striving to do our best delivering the product, which is justice according to law.

What impact has your family had on you?

My family were not lawyers. The closest we got was my grandfather, who was a journalist. Perhaps that is why I have always been slightly more sympathetic to the media than some other judges. But what we lacked in forebears, was made up in my own immediate family. Both my brothers became lawyers, solicitors, one of them a QC. My sister nurses in oncology at Royal Prince Alfred Hospital. She works with tender care, day by day, with people who are in extreme pain, and with great suffering. I have enormous admiration for the work she does. So that when we get together, there is a lot of legal gossip. But then we are brought down to reality by my sister.